COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JEFF LEACH, Individually and d/b/a BASECAMP TERLINGUA, Appellant, v. KATY SCHWARTZ, Appellee.	§	No. 08-20-00073-CV Appeal from the 394th Judicial District Court of Brewster County, Texas (TC# CVB19 347)

O P I N I O N

This is an appeal from a dismissal of Appellant Jeff Leach's action for defamation and intentional infliction of emotional distress. We reverse the trial court's dismissal which was made under the Texas Citizens Participation Act, TEX.CIV.PRAC. & REM.CODE ANN. § 27.001 *et seq.* (TCPA). Our reversal is not based on the merits of the suit, nor even the merits of the TCPA motion to dismiss. Instead, we are compelled to reverse the trial court's order dismissing the suit because the hearing which led to the dismissal occurred outside of the timeline commanded by the TCPA statute. The reasons for the late hearing here are entirely understandable, but we are not empowered to graft onto a statute a new exception to the deadline, no matter how compelling the reasons for an exception might be in this particular case.

I. BACKGROUND

This case arises out of an alleged sexual assault on June 27, 2019, committed by Leach on

Katy Schwartz (who was then his employee) at his home. In response to that alleged assault, Schwartz filed a police report with the Brewster County Sheriff's Department and a charge of discrimination with the Texas Workforce Commission. Leach responded by suing Schwartz for defamation and intentional infliction of emotional distress. Leach filed his original petition on September 11, 2019. The core factual allegation underpinning his defamation and intentional infliction of emotional distress is as follows: "Defendant stated falsely that Plaintiff had committed unwanted contact with Defendant that has been described as either sexual harassment, sexual assault, or attempted rape." He alleges that Schwartz's statements were made verbally and in writing in the Terlingua and Alpine area, and through social media and other electronic communications.

Schwartz answered these claims on October 9, 2019, raising several defenses, including truth, privilege, and that Leach is a "libel-proof" plaintiff. On the same day, she filed a motion to dismiss under the TCPA. Her motion claimed that Leach's suit was governed by the TCPA because it is based on her free speech rights over a matter of public concern, her right to petition, and association. The motion argued that Leach could not establish a prima facie case for any of his claims. She also attached evidence to establish several of her affirmative defenses to Leach's suit.[1]

At a November 8 pretrial hearing, the parties apparently agreed to a December 13 hearing date for the TCPA motion.[2] As we describe below, that date was just beyond a statutory 60-day

[1] Schwartz supplemented her TCPA motion on November 8, 2019, November 18, 2019, December 13, 2019, and February 3, 2020, each time adding additional exhibits which mostly support her truth defense, and detail other bad conduct by Leach, germane to her defense that he is a libel-proof plaintiff.

[2] Our record does not contain a docket sheet, nor any reporter's record for any of the hearings that are referenced in our opinion. Nor are there orders setting any of the hearings in our record. Rather, most of the dates noted here are from assertions in the voluminous pleadings in our clerk's record, and when pertinent, attachments to those pleadings. From a careful review of the pleadings, the dates and events described in our opinion are not contested, except as otherwise indicated.

deadline for the hearing, but because it was agreed to, it fell well within a 30-day add-on time frame allowed by the TCPA. But on December 11 the trial judge originally assigned to this case recused himself and passed the December 13 hearing date pending assignment to a new judge. And also on December 11, the Presiding Judge of the Judicial Region appointed a new judge to hear the case. Complicating the procedural posture of the case further, on December 24 Leach objected to the second trial judge assigned to hear this case.[3]

The Chief Administrative Judge for this region assigned the case to himself on January 8, 2020. And while unclear how the setting was made, the TCPA motion was apparently reset for January 10, 2020. But there was no hearing actually held on the 10th. Instead, the TCPA hearing was reset and heard on February 3, 2020. The court entertained argument over the timeliness of the setting, and considered the case based on the parties' voluminous submissions. Three days later the judge signed an order granting Schwartz's motion to dismiss. The trial court's order states that "[t]he time limits of Chapter 27 may not have been strictly complied with", but there was good cause to consider the TCPA motion to dismiss because of: "(1) the docket conditions of the 394th District Court, (2) the assignment of two subsequent trial judges as a result of striking the first assigned judge, (3) the physical remoteness of the Court and (4) agreed settings by counsel."

II. STANDARD OF REVIEW AND APPLICABLE LAW

The legislature passed the TCPA to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." *Pacheco v. Rodriguez*, 600 S.W.3d 401, 404 (Tex.App.--El Paso 2020, no pet.) *citing* TEX.CIV.PRAC. & REM.CODE ANN. § 27.002. In other

[3] Schwartz moved to strike that objection, claiming that it was filed at least one day late. The motion turned on when Leach's counsel received notice of the December 11 assignment. Our record contains no formal ruling on that motion.

words, the TCPA's "purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits." *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015), *citing* TEX.CIV.PRAC. & REM.CODE ANN. § 27.002.

A cursory review of the statute also demonstrates the Legislature desired any challenge to be resolved at the front end of a lawsuit, and promptly so. *See Grubbs v. ATW Investments, Inc.*, 544 S.W.3d 421, 422 (Tex.App.--San Antonio, 2017, no pet.) (the TCPA "provides a special procedure for the expedited dismissal of retaliatory lawsuits, which includes a series of fairly tight deadlines.") *quoting In re Lipsky*, 460 S.W.3d at 586, and *Morin v. Law Office of Kleinhans Gruber, PLLC*, No. 03-15-00174-CV, 2015 WL 4999045, at *1 (Tex.App.--Austin Aug. 21, 2015, no pet.) (mem. op.). For instance, the motion to dismiss "must be filed not later than the 60th day after the date of service of the legal action." TEX.CIV.PRAC. & REM.CODE ANN. § 27.003(b). Once filed, "all discovery in the legal action is suspended until the court has ruled on the motion to dismiss." *Id.* § 27.003(c) (but allowing the trial court to authorize focused discovery upon a good cause showing). A hearing on a TCPA motion to dismiss "must be set not later than the 60th day" after the motion is served. *Id.* § 27.004(a). That date might be pushed back to the 90th day if "the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties[.]" But these exceptions, however, can only delay the hearing to the 90th day. *Id.* ("but in no event shall the hearing occur more than 90 days after service of the motion"). The sole statutory exception beyond this deadline is when the court allows discovery germane to the TCPA motion, and then the hearing must "occur" by the 120th day. *Id.* § 27.004(c). The trial court must then rule on the motion "not later than the 30th day following the date of the hearing on the motion" or "the motion is considered to have been denied by operation of law." *Id.* §§ 27.005(a), 27.008(a). And in part to streamline the decision process, the statute sets up a four-part decision tree for resolving TCPA disputes. *See Clinical Pathology Laboratories, Inc. v. Polo,*

632 S.W.3d 35, 42 (Tex.App.--El Paso 2020, pet. denied) (describing decision-tree); *Pacheco v. Rodriguez*, 600 S.W.3d at 405 (same).

We review de novo a trial court's ruling on a TCPA motion to dismiss. *Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019); *MVS Int'l Corp. v. Int'l. Advert. Sols., LLC*, 545 S.W.3d 180, 190 (Tex.App.--El Paso 2017, no pet.). We further view the pleadings and evidence in the light most favorable to the non-movant in determining whether dismissal under the TCPA is warranted. *See Pacheco*, 600 S.W.3d at 405, *citing MVS Int'l Corp.*, 545 S.W.3d at 189-90.

This case requires that we apply statutory language, and we do so with the objective of "giv[ing] effect to the Legislature's intent, which requires us to first look to the statute's plain language." *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam). If the statute's language is unambiguous, "we interpret the statute according to its plain meaning." *Id.* And "[w]e presume the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted." *Id.* We discern the Legislature's intent from the statute as a whole, and not from individual provisions in isolation. *Texas Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 454 (Tex. 2012). We do not read words into a statute to make it what we consider to be more reasonable, rather we may do so only to prevent an absurd result. *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 930 (Tex. 2010); *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999) ("[W]hen we stray from the plain language of a statute, we risk encroaching on the Legislature's function to decide what the law should be."). Finally, "[w]e review issues of statutory construction de novo." *Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010).

III. DISCUSSION

In eight issues, Leach's appeal challenges the trial court's dismissal on essentially three grounds: (1) the trial court erred in failing to strike evidence that Schwartz offered in support of her motion, (2) that Leach made a prima facie showing in support of his claims as required by the TCPA, and (3) that the hearing was not timely held as required by the statute. We resolve the appeal on this last ground found in his Issue One.

A. The TCPA hearing was untimely

The final hearing here concluded on the 117th day following service of the TCPA motion. The relevant timeline of events from the record shows:

- October 9, 2019 – Schwartz serves her TCPA motion to dismiss
- November 8, 2019 – Pretrial where the parties agree to hear TCPA motion on December 13
- December 8, 2019 – 60th day after service of TCPA motion
- December 11, 2019 – The parties received notice of the original trial judge's recusal; new judge appointed same day
- December 13, 2019 – TCPA hearing date that was set by agreement is passed due to recusal of original judge
- December 24, 2019 – Leach objects to newly appointed judge
- January 7, 2020 – 90th day following service of TCPA motion
- January 8, 2020 – Appointment of new judge to hear case
- January 10, 2020 – TCPA hearing was set but passed .
- February 3, 2020 – Final hearing of TCPA motion
- February 6, 2020 – Order of dismissal signed
- February 6, 2020 – 120th day following service of TCPA motion

Leach does not dispute that he agreed to continue the hearing past the 60th day to be reset on a new date between the 60th and 90th day. His complaint is that the hearing was not completed until February 3, 2020, which is past the 90th day. The trial court's order alludes to missing the deadline under the statute ("[t]he time limits of Chapter 27 may not have been strictly complied with") but advances several good cause reasons for doing so: docket conditions, assignment of two new judges, the remote location of the court, and agreed settings. We do not doubt that any one of those reasons might be good cause. *See, e.g.*, *Ramsey v. Lynch*, No. 10-12-00198-CV, 2013 WL 1846886, at *5 (Tex.App.--Waco, May 2, 2013, no pet.) (mem. op.) (recusal of a judge can impact the docket conditions, which would otherwise allow an extension to the 90th day). But the question is whether the court had the latitude to conduct the hearing *past* the 90th day given the text of the statute.

Under section 27.004(a), a hearing:

> *must be set not later than the 60th day after the date of service* of the motion unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties, *but in no event shall the [TCPA] hearing occur more than 90 days after service of the [TCPA] motion . . . except as provided by Subsection (c).*

Id. § 27.004(a) (emphasis added).

Section 27.004(b) then provides:

> In the event that the court cannot hold a hearing in the time required by Subsection (a), the court may take judicial notice that the court's docket conditions required a hearing at a later date, *but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).*

Id. § 27.004(b) (emphasis added).

Finally, section 27.004(c) states:

> If the court allows discovery under Section 27.006(b), the court may extend the hearing date to allow discovery under that subsection, *but in no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003.*

Id. § 27.004(c) (emphasis added). Applying the plain language of the statute, the hearing was not held within ninety days of when the TCPA motion was filed.

B. Schwartz's answers to the timeliness are unavailing

Schwartz advances several arguments to excuse the late hearing date. Below, and to some measure on appeal, she emphasizes that the hearing was originally *set* within the 90-day time limit. And no doubt, a hearing was set on the 63rd day with the agreement of counsel, which would easily meet the requirements of section 27.004(a)(allowing extension to 90 days by agreement). Yet following amendments to the TCPA in 2013, merely setting the hearing is no longer the inquiry. Under a prior version of the TCPA, which *only* included a deadline to "set" a hearing, a party could meet the timeline of TCPA by timely setting the hearing. *See In re Lipsky*, 411 S.W.3d 530, 540 (Tex.App.--Fort Worth, 2013, orig. proceeding [mand. denied]).[4] But the same year *Lipsky* was decided, the Legislature significantly amended section 27.004 to add the four limited exceptions to the 60-day deadline: docket conditions, good cause, agreement of the parties, and when discovery is ordered. Act of May 24, 2013, 83rd Leg., R.S., ch. 1042, § 1, 2013 TEX.GEN.LAWS 2499 (current version at TEX.CIV.PRAC. & REM.CODE ANN. § 27.004(a), (b), (c)). And for these exceptions, the Legislature added the language that "in no event shall the *hearing occur* more than 90 days after service of the motion under Section 27.003" (or 120 days if discovery is required). *Id.* (emphasis supplied).

Schwartz also suggests that the hearing actually started at a pre-trial hearing on November 8, 2019. We do not have a transcript of that pretrial to know whether the motion was called and argued, but even if it was partially heard before the 90th day, the statute requires the hearing to "occur" before the deadline, and not simply to "start" or "begin." Schwartz's

[4] The *Lipsky* court applied the 2011 version of the statute. Act of May 21, 2011, 82nd Leg., R.S., ch. 341 § 2, 2011 TEX.GEN.LAWS 961, 963 (amended 2013) (Current version at TEX.CIV.PRAC. & REM.CODE ANN. § 27.004).

construction of the statute that would allow the trial court to start a hearing within the 60, 90, or 120-day timeframes and finish it sometime later would defeat the Legislature's intent to expedite TCPA determinations.

Schwartz also urged below that the failure to meet the deadline would not defeat the motion, as the Legislature never specified the consequence for non-compliance. The case law developed under the TCPA, however, has rejected that argument. The issue was squarely raised in *Grubbs v. ATW Investments, Inc.*, where the TCPA hearing was timely set, but then successively reset, with the last date outside the 90th day. 544 S.W.3d at 422. The trial court denied the TCPA motion as untimely based on the hearing date. The San Antonio court affirmed—based on the untimeliness of the hearing date—looking to an Austin case[5] that held failure to timely set the hearing was a sufficient basis to deny the motion, and a Dallas case[6] that concluded it lacked jurisdiction to hear a case where the hearing was held two months after the deadline.

The issue surfaced again in *Walker v. Pegasus Eventing, LLC*, No. 05-19-00252-CV, 2020 WL 3248476, at *1 (Tex.App.--Dallas June 16, 2020, pet. denied) (mem. op.). In that case, the parties by agreement had extended the hearing date to day 85 to conduct discovery under a Rule 11 agreement. But the trial court cancelled the hearing, resetting it on day 109, when it appeared a co-defendant had not received notice of the hearing. The trial court denied the motion, and the movant challenged that ruling on appeal. The appellate court concluded in part that unless the trial court extended the hearing date for the purpose of allowing discovery, the hearing date fell outside

[5] *Morin v. Law Office of Kleinhans Gruber, PLLC*, No. 03-15-00174-CV, 2015 WL 4999045, at *4 (Tex.App.--Austin Aug. 21, 2015, no pet.) (mem. op.) ("Viewing the TCPA as a whole, we conclude that the hearing-setting deadline is mandatory and that failure to comply with it and a failure to show good cause for that noncompliance are a proper basis for denial of a motion to dismiss.").

[6] *Braun v. Gordon*, No. 05-17-00176-CV, 2017 WL 4250235, at *3-5 (Tex.App.--Dallas Sept. 26, 2017, no pet.) (mem. op.) ("The statute requires a defendant seeking its protections to move for dismissal and obtain a hearing on the motion within certain clearly defined periods. The failure to meet these requirements results in the defendant forfeiting the statute's protections.").

the 90-day deadline and the motion should be denied for that reason. *Id*. at *8. The court further concluded that the parties' Rule 11 discovery agreement could not extend the deadline, because parties have no ability to agree to an extension beyond the 90-day deadline. *Id*.

The same year, the Dallas court also reversed an order granting a TCPA motion and awarding attorney's fees, where the hearing was conducted on day 97 and the trial court had not extended the deadline under the 120-day discovery provision. *Woods Capital Enterprises, LLC v. DXC Tech. Services LLC*, No. 05-19-00380-CV, 2020 WL 4344912, at *3 (Tex.App.--Dallas July 29, 2020, no pet.); *see also Stewart v. Douglas on behalf of TCU Pee Wee Youth Assn., Inc.*, No. 02-19-00292-CV, 2020 WL 4360560, at *4 (Tex.App.--Fort Worth July 30, 2020, no pet.) (". . . a party seeking the protections of the TCPA must comply with the requirements of timely moving for dismissal and obtaining a hearing on the motion; the failure to do so results in the party's forfeiture of the statute's protections."). And more recently, the same court sua sponte raised the timeliness issue when the trial court denied a TCPA motion 293 days after it was served; a hearing had been timely set, but then cancelled by the trial court. *Vertical Holdings, LLC v. LocatorX, Inc.*, No. 05-21-00469-CV, 2022 WL 130903, at *2, 5 (Tex.App.--Dallas Jan. 14, 2022, no pet. h.) (mem.op.) ("Based on the record before us, we conclude that, because the TCPA hearing was untimely under section 27.004, Vertical Holdings forfeited its TCPA motion, and the trial court did not err by denying it.").[7] Accordingly, we agree that the failure to hold the hearing on a timely basis is both a reason to deny the motion, and a reason to reverse the TCPA motion if granted.

[7] The *Vertical Holdings* case also addressed the possible impact of the Texas Supreme Court's emergency COVID-19 pandemic orders and concluded there was no evidence that the pandemic contributed to the delay. *Id.* at *5. In our case, the events occurred several months before the first COVID emergency order. This fact also distinguishes a case Schwartz relies on, *CBS Stations Group of Texas, LLC v. Burns*, No. 05-20-00700-CV, 2020 WL 7065827, at *3 (Tex.App.--Dallas Dec. 3, 2020, no pet.) (mem. op.). In that case, a court started a hearing and the non-movant asked for and was granted a continuance to obtain evidence that it was not able to get because of COVID-19 restrictions. Nonetheless, the movant filed its appeal within 30 days of the continued hearing in the event that the motion was overruled by operation of law. The court of appeals concluded that the trial court had the ability to continue the hearing under Texas Supreme Court's 17th Emergency Order and dismissed the appeal for want of jurisdiction.

Another argument that Schwartz advances is that the 120-day period applied because the trial court extended the hearing under section 27.004(c) ("If the court allows discovery under Section 27.006(b), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003."). Our record, however, does not support that claim. Schwartz filed a third supplement to her TCPA motion on December 13, 2019, that attached several new exhibits and asked the trial court to allow discovery into several specific matters. The requested matters for discovery included obtaining Leach's cell phone to examine it for texts sent or received during the relevant time period. The motion also sought discovery into Leach's Facebook account, as well as cell phone and Facebook accounts for one specified employee, and more generally, employee texts and emails between Leach and his current and former employees. Finally, the motion requested a "live hearing" on the TCPA motion to present some of the information sought. Leach opposed the request.

From our record, the discovery request was never set for a hearing, nor expressly ruled upon. Nor does our record show that Schwartz ever obtained by order, or otherwise, the cell phones, Facebook accounts, or other information that she sought in the December 13 motion. Moreover, leading up to the final hearing, Schwartz specifically outlined the 90-day and 120-day deadline issue to the trial court, and asked the court to grant its motion to conduct additional discovery to gain the benefit of the 120-day deadline. But the trial court's final order did not do so, nor did it extend the hearing to allow for additional discovery. It did not allow live testimony as the December 13 motion sought. Rather, the order acknowledges that the time deadlines have not been strictly met and offered other reasons for the late hearing. Had the trial court intended to extend the deadline to allow for discovery, it could have done so, but did not. Accordingly, we

cannot conclude that the trial court allowed the discovery as requested so as to extend the hearing deadline to the 120th day.[8]

Finally, Schwartz emphasizes her repeated efforts to obtain a setting on her hearing. We do not discount those, but neither can we judicially create an exception to the deadline that the Legislature has not allowed for. Nor do we discount the considerable time and resources expended by the parties as evidenced by the TCPA motion, its supplement, and the responses made by Leach. We simply lack a statutory basis to consider them in the context of the expedited TCPA procedure as promulgated by the Legislature.

IV. CONCLUSION

For these reasons, we reverse the judgment below based on Issue One, and accordingly do not reach Issues Two, Three, Four, Five, Six, Seven, and Eight. We remand the case to the district court for proceedings not inconsistent with this opinion. All pending motions are denied as moot.

JEFF ALLEY, Justice

April 29, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.

[8] Schwartz suggest that because the trial court did not strike any of her supplemental exhibits, we can infer that the trial court granted her discovery extension request. Merely allowing an extension to file additional exhibits is not the same as granting a section 27.004(c) extension. *See Woods Capital Enterprises, LLC v. DXC Tech. Services LLC*, No. 05-19-00380-CV, 2020 WL 4344912, at *4 (Tex.App.--Dallas July 29, 2020, no pet.). Moreover, Schwartz does not explain how any of the supplemental pieces of evidence correlate to the specific items of limited discovery she sought in the December 13 motion. For instance, her fourth motion to supplement, filed January 2, 2020, does not contain any cell phone, Facebook, or intercompany communications as were sought in the December 13 motion.